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No. 01-

In the Supreme Court of the United States

UNITED HAULERS ASSOCIATION, INC., TRANSFER SYSTEMS, INC., BLISS ENTERPRISES, INC., KEN WITTMAN SANITATION, BRISTOL TRASH REMOVAL, LEVITT'S COMMERCIAL CONTAINERS, INC., AND INGERSOLL PICKUP INC.

Petitioners,

v.

ONEIDA-HERKIMER SOLID WASTE MANAGEMENT AUTHORITY, COUNTY OF ONEIDA, AND COUNTY OF HERKIMER

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

This Court held in *C & A Carbone, Inc. v. Town of Clarkstown,* 511 U.S. 383, 385 (1994), that "a so-called flow control ordinance, which require[d] all solid waste to be processed at a designated transfer station before leaving the municipality," violated the Commerce Clause because it "depriv[ed] competitors, including out-of-state firms, of access to a local market." The question presented is whether the prohibition against "hoard[ing] solid waste" (*id.* at 392) recognized in *Carbone* is inapplicable when the "preferred processing facility" (*ibid.*) is owned by a public entity.

RULE 29.6 STATEMENT

None of petitioners has a parent company and no publicly held company owns 10% or more of the stock of any of the petitioners.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners United Haulers Association, Inc., Transfer Systems Inc., Bliss Enterprises, Inc., Ken Wittman Sanitation, Bristol Trash Removal, Levitt's Commercial Containers, Inc., and Ingersoll Pickup Inc. respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-33a) is reported at 261 F.3d 245. The Memorandum-Decision and Order of the United States District Court for the Northern District of New York granting plaintiffs summary judgment (App., *infra*, 34a-48a) is unreported.

JURISDICTION

The judgment of the Second Circuit was entered on July 27, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES AND CONSTITUTIONAL PROVISION INVOLVED

Section 2(d) of Oneida County Board of Legislators Resolution No. 301 provides in relevant part:

> From the time of placement of solid waste and of recyclables at the roadside or other designated area approved by the County, or by the [Oneida-Herkimer Solid Waste Management] Authority pursuant to contract with the County, by a person for collection in accordance herewith, such solid waste and recyclables shall be delivered to the appropriate facility, entity or person responsible for disposition designated by the County or by the Authority pursuant to contract with the Authority.

Resolution No. 301 is set forth in full at App., *infra,* 49a-62a.

Section 2(c) of Herkimer County Local Law, Introductory No. 1 - 1990, provides in relevant part:

> After placement of garbage and of recyclable materials at the roadside or other designated area approved by the Legislature by a person for collection in accordance herewith, such garbage and recyclable material shall be delivered to the appropriate facility designated by the Legislature, or by the [Oneida-Herkimer Solid Waste Management] Authority pursuant to contract with the County.

Herkimer County Local Law, Introductory No. 1- 1990, is set forth in full at App., *infra,* 63a-76a.

Article I, Section 8 of the U.S. Constitution provides in relevant part:

> The Congress shall have Power * * * To regulate Commerce * * * among the several States * * *.

STATEMENT

In *C & A Carbone, Inc. v. Town of Clarkstown,* 511 U.S. 383 (1994), this Court held invalid under the dormant Commerce Clause a local ordinance that required all municipal solid waste within the town to be delivered to a transfer station that was built by a private company at the town's instigation and that was to be sold to the town for $1 after five years (the time it was expected to take the private entity to recoup its investment). The facts of the present case are virtually identical, except the designated transfer station in this case, although constructed and operated by a private company, has been owned from day one by a public entity. The court of appeals concluded that this distinction made a case-dispositive difference, holding that there can be no discrimination against interstate commerce when the business being favored is publicly owned. This holding threatens to render *Carbone* a

dead letter (and to incite the kind of balkanization that the Commerce Clause was designed to forestall) because it is a simple matter for municipalities to structure (or restructure) transactions so that they have record title to the preferred facility. Because municipalities around the country have been steadfastly seeking to impose flow control notwithstanding the dictates of *Carbone,* the question whether *Carbone* can be so easily circumvented is one of great significance that warrants this Court's immediate attention.

The pertinent facts are simple and undisputed.

1. *Waste Collection in Oneida and Herkimer Counties.* Oneida and Herkimer Counties are sparsely populated counties in upstate New York. Historically, collection of trash has been a private function in these counties. Unlike Washington, D.C., New York City, or some other metropolis, most local governments in Oneida and Herkimer Counties have never assumed responsibility for the collection of trash from their residents.[1]

2. *The Imposition of Flow Control in Oneida and Herkimer Counties.* In September 1988, at the request of Oneida and Herkimer Counties, the New York State Legislature created the Oneida-Herkimer Solid Waste Management Authority ("the Authority"). App., *infra,* 4a, 36a. In May and December 1989, the Authority entered into contracts with the Counties that required the Authority to purchase, operate, construct, and develop facilities for the processing and/or disposal of solid waste and recyclables generated in the Counties. For their part, the Counties agreed to ensure the delivery of all solid waste generated within their borders to facilities designated by the Authority. *Id.* at 4a-5a, 36a-37a.

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[1] In most parts of Oneida and Herkimer Counties, residents and businesses must make their own arrangements with private haulers. However, at least one city (Utica) has traditionally contracted with a private hauler on behalf of all of its residents.

Pursuant to the December 1989 contract, the Authority agreed to issue and sell bonds to finance the Counties' solid waste management plans, and the Counties agreed to pay any shortfall between the Authority's operating expenses and its revenues (*e.g.*, tipping fees and income from the sale of recyclables). *Id.* at 5a, 37a.

In December 1989, Oneida County passed the required flow control ordinance. The ordinance specifies that all solid waste and recyclables left at curbside must "be delivered to the appropriate facility, entity or person responsible for disposition designated by the County or by the Authority * * *." App., *infra*, 53a-54a. Under the ordinance, any hauler handling waste generated in the County must have a valid permit issued by the County or the Authority (*id.* at 58a-59a) and must deliver all construction debris, green waste, commercial and industrial waste, curbside recyclables, major appliances and tires, household hazardous waste and infectious waste to designated facilities (*id.* at 55a-58a). Penalties for noncompliance include permit revocation, fines, and imprisonment (*id.* at 59a, 60a-61a). Herkimer County enacted an almost identical flow control ordinance in February 1990. App., *infra*, 63a-76a.

The Authority's Solid Waste Plan expressly contemplates "the development of a new long-term landfill site to accommodate the non recyclable portion of the waste stream" of the two Counties. 2d Cir. J.A. 210.[2] Pending development of its own landfill, however, the Authority needed to construct a local transfer station to store, transfer and consolidate municipal solid waste. In June 1991, after issuing a request for proposals and considering the responses it received, the Authority contracted with a private entity (Empire Sanitary Landfill of Taylor, Pennsylvania ("Empire")) for the design, construction and operation of a transfer station in Utica, Oneida County, with subsequent disposal of the waste in Empire's

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[2] Citations to the joint appendix in the Second Circuit are designated "2d Cir. J.A. __."

landfill in Pennsylvania. App., *infra,* 7a.[3] The contract required the Authority to divert all solid waste generated in the Counties (except recyclables and waste burned at the Authority's incinerator) to the Utica Transfer Station. 2d Cir. J.A. 278, 290. Consistent with this agreement, the Authority's 1995 Rules and Regulations expressly require haulers to "deliver all acceptable solid waste and curbside collected recyclables generated within Oneida and Herkimer Counties to an Authority designated facility." App., *infra,* 8a; 2d Cir. J.A. 451.

In 1995, the Authority designated five Authority-owned facilities for the processing and/or disposal of solid waste and recyclables generated in the Counties — an incinerator, a recycling center, an ash landfill, a green waste compost facility, and the Utica Transfer Station. 2d Cir. J.A. 457-458. At that time, the monopolistic tipping fee at the transfer station was $86 per ton; that fee was doubled for waste requiring witnessed disposal or containing more than 25% of recyclables. App., *infra,* 8a-9a; 2d Cir. J.A. 455. As the Second Circuit recognized, "[e]ven the lowest tipping fee charged under the Counties' scheme is higher than the market value for the disposal services the Authority provides." App., *infra,* 9a. Indeed, petitioners submitted evidence that, if permitted to do so, they could dispose of waste they collect in Oneida and Herkimer Counties at out-of-state facilities at a cost of as little as $26 per ton. 2d Cir. J.A. 463, 464; see also *id.* at 429-430, 440-441 ($37 per ton to $55 per ton, including transportation); *id* at 446-447 ($39.20 per ton, including transportation, for construction and demolition waste).

3. *Proceedings below.* In April 1995, petitioners — six haulers that do business in Oneida and Herkimer Counties and a trade association — filed suit in the United States District

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[3] The agreement with Empire expired in 1998, at which time Waste Management of New York was selected to operate the transfer station. App., *infra,* 7a.

Court for the Northern District of New York against the Authority and both Counties, alleging, *inter alia,* that the flow control ordinances and the Authority's Rules and Regulations (collectively "the flow control laws") violate the dormant Commerce Clause and that, in enforcing those laws, defendants deprived them of their constitutional rights in violation of 42 U.S.C. § 1983. On March 31, 2000, the district court (Pooler, J., sitting by designation) granted plaintiffs' motion for summary judgment, concluding that the flow control laws violated the dormant Commerce Clause and that enforcement of those ordinances was in violation of Section 1983.

The district court found the unconstitutionality of the flow control laws to be conclusively established by *Carbone.* It explained:

> These flow control laws are virtually indistinguishable from the laws examined and struck down in both *Carbone* and *SSC Corp.* [*v. Town of Smithtown,* 66 F.3d 502 (2d Cir. 1995)]. * * * Courts have considered it almost a foregone conclusion that flow control laws violate the dormant commerce clause. * * * I accordingly conclude that the flow control laws in Oneida and Herkimer counties also violate the dormant commerce clause. The laws are discriminatory and *per se* invalid.

App., *infra,* 42a-43a.

The court rejected defendants' contention that the challenged laws could be distinguished on the ground that they constitute "an inextricable part of a public waste management system for the local management of local waste," stating: "the relevant case law consistently has extracted flow control laws as an improper element of general waste management schemes." *Id.* at 44a. And in response to defendants' argument that "they merely have restructured the private collection market and prohibited haulers from crossing over into the disposal market," the district court explained:

> [T]he flow control laws dictate where the haulers must bring local solid waste and at what price. Although defendants contend repeatedly that their system treats all parties alike with respect to disposal services, what they actually are doing is hoarding all local solid waste for the benefit of a preferred local disposal facility.

Id. at 45a.

Finally, the district court rejected defendants' contention that summary judgment was premature because they had not yet received discovery, stating:

> To the extent that any factual issues exist, they are not material to my decision regarding the constitutionality of the flow control laws. The laws and regulations speak for themselves and are not disputed. The discriminatory effects of flow control also are a settled matter of law after the Supreme Court's decision in *Carbone,* and defendants offer no new arguments on this point.

Id. at 44a.

Having found the flow control laws unconstitutional, the district court enjoined their enforcement and referred the matter to the magistrate judge for determination of damages. *Id.* at 45a. Defendants appealed under 28 U.S.C. § 1292(a)(1).

The Second Circuit reversed. It concluded that "the district court erred in its Commerce Clause analysis by failing to recognize the distinction between private and public ownership of the favored facility" and held that "a municipal flow control law does not discriminate against out-of-state interests in violation of the Commerce Clause when it directs all waste to publicly owned facilities." App., *infra,* 19a.

The court professed uncertainty as to whether this Court had rejected the "public/private distinction" in *Carbone,* stating that the *Carbone* majority's "language can fairly be described

as elusive on that point." *Id.* at 25a. It then proceeded to distinguish the "local processing cases" relied upon by the Court in *Carbone* on the ground that the favored businesses in each case were private entities. *Id.* at 25a-27a. At the same time, the Second Circuit identified no case from any court upholding a local processing law that favored a publicly owned business. Instead, it treated the fact that the local processing cases involved private businesses as "precedential support" for its conclusion (*id.* at 30a) and reasoned that "[t]he common thread in the Court's dormant Commerce Clause jurisprudence, highlighted in the local processing cases * * *, is that a local law discriminates against interstate commerce when it hoards local resources *in a manner* that favors local business, industry or investment over out-of-state competition" (*id.* at 27a (emphasis in original)). Relying on Justice Souter's dissent in *Carbone,* the Second Circuit found there to be "sound reason for the Court's consistent, although often unstated, recognition of the distinction between public and private ownership of favored facilities," namely that "'[r]easons other than economic protectionism are . . . more likely to explain the design and effect of an ordinance that favors a public facility.'" *Ibid.* (quoting *Carbone,* 511 U.S. at 421 (Souter, J., dissenting)). See also *id.* at 28a-29a (quoting additional reasoning from Justice Souter's dissent).

Having embraced the public/private distinction, the court proceeded to dismiss the numerous cases that have struck down flow control laws that favored publicly owned waste disposal facilities on the ground that "their holdings are not binding on our determination and have little persuasive value given that the courts did not directly address the issue we decide today." *Id.* at 30a. As for the one case that did directly address the issue — *Southcentral Pa. Waste Haulers Ass'n v. Bedford-Fulton-Huntington Solid Waste Auth.*, 877 F. Supp. 935, 943 (M.D. Pa. 1994) — the Second Circuit stated: "We believe that it does not change the analysis and we respectfully disagree with that decision for the reasons already discussed." App., infra, 30a.

The court accordingly held that the district court erred in applying the strict level of scrutiny applicable to discriminatory legislation and instead should have applied the more lenient balancing test articulated in *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). Although admitting that it was tempted to apply *Pike* itself (and presumably uphold the laws under it), the court satisfied itself with remanding the case to the district court with a very strong hint as to how to rule. See App., *infra*, 31a (emphasizing the "well-settled principle that waste disposal is a traditional local government function"); *id.* at 32a (noting that "[i]n the past, we have held that a municipality has legitimate — indeed, compelling — interests that are served by its waste management program") (internal quotation marks and citation omitted); *ibid.* (stating that "the fact that a municipality is acting within its traditional purview must factor into the district court's determination of whether the local interests are substantially outweighed by the burdens on interstate commerce").

REASONS FOR GRANTING THE PETITION

Since this Court's decision in *Carbone*, courts around the country have assumed — correctly, we submit — that municipalities are constitutionally precluded from requiring that local waste be processed and/or disposed of locally regardless of the identity of the record title owner of the preferred local facility. The decision below represents a dramatic departure from this otherwise uniform understanding of *Carbone*. If allowed to stand, that decision will provide a clear road map for circumventing *Carbone*. It can fairly be expected that the many municipalities whose flow control ordinances fell in the wake of *Carbone* will attempt to resuscitate those ordinances under the new theory that *Carbone* is inapplicable to laws that require the delivery of waste to publicly owned facilities. Certiorari is warranted because the decision below unduly narrows *Carbone*, is out of step with this Court's renunciation of the use of formalistic distinctions in resolving Commerce Clause challenges, is in severe tension

with this Court's "market participant" case law, is inconsistent with numerous cases that have struck down flow control ordinances directing that waste be brought to publicly owned facilities, and will have the inevitable consequence of reviving efforts to impose flow control throughout the country, thereby impeding interstate commerce in waste.

A. The Second Circuit's Decision Is Inconsistent With *Carbone*.

1. *Carbone* involved an ordinance that required that all solid waste within the defendant town's borders be brought for processing to a particular transfer station designated by the town. The transfer station was constructed by a private entity, which, by agreement with the town, was to operate the facility for five years, whereupon the town was to purchase the facility for $1. 511 U.S. at 387. The town guaranteed that the facility would receive a minimum of 120,000 tons of waste annually and authorized the contractor to charge a tipping fee of $81 per ton, a rate that exceeded the one waste haulers would pay in the open market. *Ibid.* "The object of this arrangement was to amortize the cost of the transfer station: The town would finance the new facility with the income generated by the tipping fees." *Ibid.*

This Court held that, because the town's flow control ordinance "attains this goal by depriving competitors, including out-of-state firms, of access to a local market, * * * the flow control ordinance violates the Commerce Clause." *Id.* at 386. It explained that, in the context of flow control laws, "the article of commerce is not so much the solid waste itself, but rather the service of processing and disposing of it." *Id.* at 391. "With respect to this stream of commerce, the flow control ordinance discriminates, for it allows only the favored operator to process waste that is within the limits of the town." *Ibid.*

The Court saw the challenged flow control ordinance as "just one more instance of local processing requirements that we long have held invalid." *Ibid.* It stated:

> The essential vice in laws of this sort is that they bar the import of the processing service. * * * The flow control ordinance has the same design and effect. It hoards solid waste, and the demand to get rid of it, for the benefit of the preferred processing facility. * * * The flow control ordinance at issue here squelches competition in the waste-processing service altogether, leaving no room for investment from outside.

Id. at 392. Having found the ordinance to discriminate against interstate commerce, the Court proceeded to determine that flow control is not the least discriminatory means of achieving any legitimate local interest (*id.* at 392-394) and accordingly held that the ordinance violated the Commerce Clause.

Justice O'Connor concurred in the judgment. She was of the view that the flow control ordinance did not discriminate against interstate commerce because "the garbage sorting monopoly is achieved at the expense of all competitors, be they local or nonlocal." *Id.* at 404. She nevertheless concluded that the ordinance failed the *Pike* balancing test. She explained that, in ascertaining the burden on commerce, it is necessary to consider "what effect would arise if not one, but many or every, jurisdiction adopted similar legislation." *Id.* at 406 (internal quotation marks and brackets omitted). Justice O'Connor observed that "pervasive flow control would result in the type of balkanization the [Commerce] Clause is primarily intended to prevent." *Ibid.* She therefore concluded that "the burden [the challenged flow control ordinance] imposes on interstate commerce is excessive in relation to [the town's] interest in ensuring a fixed supply of waste to supply its project." *Id.* at 407.

Justice Souter (joined by the Chief Justice and Justice Blackmun) dissented. The dissenters were of the view that the majority had "underestimate[d] or overlook[ed]" "both analytical and practical differences between this and the earlier [local] processing cases" that "should prevent this case from

being decided the same way." *Id.* at 416. Specifically, the dissenters argued, "***the one proprietor * * * favored [by the challenged flow control ordinance] is essentially an agent of the municipal government*** * * *. Any discrimination worked by [the ordinance] thus fails to produce the sort of entrepreneurial favoritism we have previously defined and condemned as protectionist." *Ibid.* (emphasis added). The dissenters further explained:

> While our previous local processing cases have barred discrimination in markets served by private companies, ***Clarkstown's transfer station is essentially a municipal facility, built and operated under a contract with the municipality and soon to revert entirely to municipal ownership.*** * * * The majority ignores this distinction between public and private enterprise, equating [the ordinance's] "hoard[ing]" of solid waste for the municipal transfer station with the design and effect of ordinances that restrict access to local markets for the benefit of local private firms. * * * Reasons other than economic protectionism are * * * more likely to explain the design and effect of an ordinance that favors a public facility. * * * ***An ordinance that favors a municipal facility, in any event, is one that favors the public sector,*** and if we continue to recognize that the States occupy a special and specific position in our constitutional system and that the scope of Congress' authority under the Commerce Clause must reflect that position, then surely this Court's dormant Commerce Clause jurisprudence must itself see that favoring state-sponsored facilities differs from discriminating among private economic actors, and is much less likely to be protectionist.

Id. at 419-421 (emphasis added; internal quotation marks, citations, and footnote omitted). The dissenters concluded that the ordinance should be upheld because it "conveys a privilege ***on the municipal government alone,*** the only market

participant that bears responsibility for ensuring that adequate trash processing services continue to be available to Clarkstown residents." *Id.* at 430 (emphasis added).

2. The Second Circuit's assertion that this Court had not already considered and rejected the public/private distinction in *Carbone* is untenable. That distinction was the centerpiece of a vigorously argued dissent. Obviously aware of this central contention of the dissent, the Court nonetheless stated that, "having elected to use the open market to earn revenues for ***its*** project, the town may not employ discriminatory regulation to give that project an advantage over rival businesses from out of State." *Id.* at 394 (emphasis added). This Court thus evidently (and, quite correctly, under the circumstances) regarded the fact of ownership as a formality: as the dissent itself contended, for all practical purposes, the transfer station was "essentially a municipal facility" (*id.* at 419), which was to be formally transferred to the town the following year. Indeed, if it had intended its holding to preclude the flow control ordinance only for the year until the town was to receive record title to the facility, the Court surely would have said so.

Moreover, the core reasoning of the majority opinion applies fully regardless of the identity of the owner of the preferred facility. As the Court observed:

> The central rationale for the rule against discrimination is to prohibit state or municipal laws whose object is local economic protectionism, laws that would excite those jealousies and retaliatory measures the Constitution was designed to prevent.

Id. at 390. Local processing laws run afoul of this "central rationale" because "they bar the import of the processing service." *Id.* at 392. Specifically, the challenged flow control ordinance impermissibly discriminated because "it allow[ed] only the favored operator to process waste that [was] within the limits of the town." *Id.* at 391.

Whether the owner of the preferred facility is a private business or a public entity, a flow control law, by "allow[ing] only the favored operator to process waste that is within the limits of the town," constitutes "economic protectionism" of that preferred local facility and threatens to result in "retaliatory measures." Indeed, as discussed further below, if the Second Circuit's public/private distinction is left standing, it is predictable that municipalities around the country will take advantage of the ruling to establish (or revive) their own flow control laws, with the result being that interstate commerce in the service of waste processing will be dramatically impeded.

In short, *Carbone* did, at least implicitly, reject the public/private distinction, and the Second Circuit's adoption of that distinction therefore conflicts with *Carbone*.

B. The Second Circuit's Decision Is Irreconcilable With This Court's Renunciation Of The Use Of Formalistic Distinctions In Resolving Commerce Clause Challenges.

Under the Second Circuit's decision, the validity of flow control turns almost entirely on the identity of the record title owner of the preferred facility. If legal title to a facility is in the name of a private entity, a law requiring that waste be delivered to that facility is subject to the Court's virtually *per se* rule of invalidity. If legal title to a facility is in the name of a public entity — even if constructed and operated by a private entity — the very same law would be evaluated under the more deferential *Pike* test. The effect of the law on interstate commerce is precisely the same, yet the result couldn't be more different.

The Second Circuit's decision, in short, exalts form over substance. In so doing, it deviates markedly from this Court's modern Commerce Clause jurisprudence, which has steadfastly "eschewed formalism" in favor of "a sensitive, case-by-case analysis of purposes and effects." *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 201 (1994). See also *Trinova Corp. v. Michigan Dep't of Treasury*, 498 U.S. 358, 373 (1991) ("[w]e

seek to avoid formalism and to rely upon a consistent and rational method of inquiry") (internal quotation marks omitted). For example, during the middle part of the twentieth century, the Court drew a distinction between taxes on the privilege of engaging in interstate commerce and taxes on the privilege of using a state's highways, holding the former unconstitutional and the latter permissible. Later, however, the Court renounced this distinction as "a triumph of formalism over substance" (*Complete Auto Transit, Inc. v. Brady,* 430 U.S. 274, 281 (1977) that "allowed the validity of statutes to hinge on 'legal terminology,' 'draftsmanship and phraseology'" (*Quill Corp. v. North Dakota,* 504 U.S. 298, 310 (1992) (quoting *Complete Auto,* 430 U.S. at 281)).

The public/private distinction embraced by the Second Circuit is a throwback to the formalism that this Court has renounced. Review is warranted to bring the Second Circuit back in line with what the Court has determined to be the appropriate focus: "whether the [challenged law] produces a forbidden effect" (*Complete Auto,* 430 U.S. at 288).

C. The Second Circuit's Decision Is In Tension With This Court's "Market Participant" Case Law.

This Court's "market participant" doctrine provides that the strictures of the dormant Commerce Clause do not apply when a state or local government "is acting as a market participant, rather than as a market regulator." *South-Central Timber Dev., Inc. v. Wunnicke,* 467 U.S. 82, 93 (1984) (plurality op.). This doctrine "is not *carte blanche* to impose any conditions that the State has the economic power to dictate, and does not validate any requirement merely because the State imposes it upon someone with whom it is in contractual privity." *Id.* at 97. To the contrary, the doctrine "allows a State to impose burdens on commerce within the market in which it is a participant, but allows it to go no further. The State may not impose conditions, whether by statute, regulation, or contract, that have

a substantial regulatory effect outside of that particular market." *Ibid.*[4]

Here, it is unquestionable that the market participant doctrine does not immunize respondents' laws requiring that waste collected by private haulers within the boundaries of Oneida and Herkimer Counties be brought to the Authority's transfer station for processing. Indeed, the Second Circuit so recognized. See App., *infra,* 15a ("The Counties' flow control laws require private haulers to obtain a permit from the Counties and to deliver all waste to Authority designated facilities. Failure to do either exposes the private hauler to fines, revocation of its permit to pick up solid waste, and imprisonment. Therefore, the Counties have availed themselves of the unique powers or special leverage they enjoy by virtue of their status as sovereigns and, thus, are regulating the market for waste collection and disposal.") (brackets and citations omitted).

Yet in holding that respondents' ownership of the facility they have ordered petitioners to utilize renders the flow control laws non-discriminatory (and hence subject only to a deferential balancing test, the outcome of which the court has already largely prejudged), the Second Circuit has given state and local governments the very *carte blanche* this Court has denied them under the market participant doctrine. If the Second Circuit's decision is allowed to stand, state and local

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[4] It merits mention that, in the case in which the Court first recognized the market participant doctrine, the Court found it significant that "the commerce affected by the [challenged law] appears to have been created, in whole or in substantial part, by the [overall program of which the challenged law was a part]." *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 809 n.18 (1976). See also *id.* at 815-816 (Stevens, J., concurring). The present case presents the flip side of this situation: commerce in processing services and recyclables pre-dated respondents' entry into the waste processing business and, by fiat, respondents have arrogated to themselves all of that pre-existing commerce.

governments could be emboldened to enter any number of markets and then use their regulatory powers to favor themselves over their private interstate competitors. Although such self-dealing would not entirely be immunized from scrutiny under the dormant Commerce Clause, the notion that it need only survive the *Pike* balancing test is in significant tension with the Court's strongly expressed concern that the market participant doctrine not "swallow[] up the rule that States may not impose substantial burdens on interstate commerce even if they act with the permissible state purpose of fostering local industry." *South-Central Timber*, 467 U.S. at 98 (plurality op.).

D. The Second Circuit's Decision Is Inconsistent With Those Of Numerous Other Courts That Have Invalidated Flow Control Laws That Required Waste To Be Brought To Publicly Owned Facilities.

The Second Circuit's end-run around *Carbone* places it in tension with *every* other court that has considered a challenge to a flow control law that required waste to be brought to a publicly owned facility. See *Huish Detergents, Inc. v. Warren County*, 214 F.3d 707, 715-16 (6th Cir. 2000) (ordinance that required all waste to be processed at county-owned transfer station discriminated against interstate commerce); *Waste Mgmt., Inc. v. Metropolitan Gov't*, 130 F.3d 731, 733, 736 (6th Cir. 1997) (striking down flow control ordinance that required all residential waste to be disposed of at publicly owned facility); *Harvey & Harvey, Inc. v. County of Chester*, 68 F.3d 788, 794 (3d Cir. 1995) (two of the three designated facilities in one of two consolidated cases were publicly owned; case remanded for determination of whether process of designating facilities was discriminatory); *Atlantic Coast Demolition & Recycling, Inc. v. Board of Chosen Freeholders*, 48 F.3d 701 (3d Cir. 1995) (holding that New Jersey regulations requiring flow control discriminated against interstate commerce and making no distinction based on whether preferred facility is publicly or privately owned); *Waste Sys. Corp. v. County of*

Martin, 985 F.2d 1381, 1383 (8th Cir. 1993) (striking down flow control ordinance that required all waste to be delivered to facility built and owned by waste district); *Zenith/Kremer Waste Sys., Inc. v. Western Lake Superior Sanitary Dist.,* 1996 WL 612465, at *1-*3, *10 n.13 (D. Minn. July 2, 1996) (striking down flow control ordinance that required all waste to be disposed of at facility owned by waste district because "the District has not shown and, in fact, it cannot show, that out-of-state disposal facilities competed, on a level playing field, when the District designated its own facility as the sole solid waste processing center"); *Southcentral Pa. Waste Haulers Ass'n v. Bedford-Fulton-Huntingdon Solid Waste Auth.,* 877 F. Supp. 935, 943 (M.D. Pa. 1994) (indicating that it was "not persuaded that the public nature of the [designated] facility changes the applicable analysis" in part because the *Carbone* dissent pointed out that the facility at issue there "was built and operated pursuant to a contract with the municipality, performed a traditional municipal function and was soon to revert to municipal ownership," but "[t]hese facts did not persuade the majority that the regime was non-discriminatory or that the less stringent *Pike* analysis should apply"); *Waste Recycling, Inc. v. Southeast Ala. Solid Waste Disposal Auth.,* 814 F. Supp. 1566 (M.D. Ala. 1993) (striking down flow control ordinance that required all waste to be disposed of at publicly owned facility), aff'd per curiam, 29 F.3d 641 (11th Cir. 1994); *Heier's Trucking, Inc. v. Waupaca County,* 569 N.W.2d 352 (Wis. Ct. App. 1997) (affirming trial court order striking down ordinance that required all recyclables collected in participating municipalities to be delivered to Waupaca County Processing Facility).

To be sure, as the Second Circuit pointed out, most of these cases did not expressly address the public/private distinction. However, in light of the fact that the distinction was expressly advocated in Justice Souter's dissent in *Carbone,* it is inconceivable that these courts simply overlooked this potentially case-dispositive basis for distinguishing *Carbone.*

It is far more likely that they, like the district court in *Southcentral Pennsylvania Waste Haulers*, simply found the distinction unavailing. Because there can be little question that this case would have been decided differently had it arisen in the Third, Sixth, or Eighth Circuits, the Second Circuit's adoption of the public/private distinction creates disharmony among the federal courts of appeals that should be resolved now.

E. The Issue Presented Is An Important One That Requires The Court's Immediate Attention.

In her concurring opinion in *Carbone*, Justice O'Connor observed:

> Over 20 states have enacted statutes authorizing local governments to adopt flow control laws.[5] If the localities in these States impose the type of restriction on the movement of waste that Clarkstown has adopted, the free movement of solid waste in the stream of commerce will be severely impaired. Indeed, ***pervasive flow control would result in the type of balkanization the [Commerce] Clause is primarily intended to prevent.***

511 U.S. at 406 (emphasis added; footnote omitted).

As the post-*Carbone* case law reflects, that prediction was hardly an exaggeration. Since *Carbone*, the courts have adjudicated numerous challenges to state or local flow control provisions. In addition to the ones cited in the preceding section, courts have invalidated at least four other flow control provisions. See *U & I Sanitation v. City of Columbus*, 205 F.3d 1063 (8th Cir. 2000); *Ben Oehrleins & Sons & Daughter v.*

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[5] As of 1995, at least 39 states and the District of Columbia had authorized localities to impose flow control. See United States Environmental Protection Agency, *Report to Congress: Flow Controls and Municipal Solid Waste* II-1 to II-5 (Mar. 1995).

Hennepin County, 115 F.3d 1372, 1384-1385 (8th Cir. 1997); *SSC Corp. v. Town of Smithtown,* 66 F.3d 502 (2d Cir. 1995); *Coastal Carting Ltd. v. Broward County,* 75 F. Supp. 2d 1350 (S.D. Fla. 1999).

Moreover, in an effort to comply with *Carbone,* while still garnering as much of the economic benefits of flow control as possible, several municipalities have adopted (and courts have upheld) laws imposing "intra-state" flow contro — *i.e.,* they impose flow control except insofar as waste is destined for disposal out of state. See, *e.g., On the Green Apartments L.L.C. v. City of Tacoma,* 241 F.3d 1235 (9th Cir. 2001); *Ben Oehrleins,* 115 F.3d at 1385-1387; *Vince Refuse Serv., Inc. v. Clark County Solid Waste Mgmt. Dist.,* 1995 WL 253121 (S.D. Ohio Mar. 7, 1995). But see *Randy's Sanitation, Inc. v. Wright County,* 65 F. Supp. 2d 1017 (D. Minn. 1999) (intrastate flow control ordinance unconstitutionally burdened interstate commerce). If the Second Circuit's decision is left standing, some or all of these municipalities surely will seek to take ownership of their preferred facilities (if they don't own them already), which would then enable them to eliminate the exception in their flow control ordinances for waste destined for disposal in other states.

In addition, as the outpouring of governmental amicus briefs in *Carbone* reflects, the published cases are just the tip of the iceberg. Those amicus briefs indicate that, as of the time *Carbone* was being briefed, literally dozens of municipalities around the country had enacted or intended to enact flow control provisions. See, *e.g.,* Brief of *Amici Curiae* Solid Waste Association of North America et al. in Support of Respondent at 5 (amicus brief of eleven municipal waste authorities in nine states, plus a national association, asserting that "[f]or the *amici,* flow control is a rational, nondiscriminatory mechanism for the interactive and complementary use of [their] waste management methods as part of an environmentally sound strategy for municipal solid waste management"); Brief for *Amici Curiae* Prince George's

County, Maryland and Carroll County, Maryland in Support of Respondent at 1-2 (indicating that Prince George's County had already adopted flow control and that Carroll County was contemplating adopting flow control); Brief of Amicus Curiae County of San Diego, California in Support of Respondent at 1-2 ("The County Disposal System serves vital health and safety interests and depends on 'flow control' for its very existence."); Brief of the State of New Jersey as Amicus Curiae in Support of the Respondent at 2-3 ("New Jersey's current Statewide solid waste management program is based upon a network of statutes and implementing administrative regulations which require that all locally generated solid waste be ultimately brought to designated local disposal or transfer facilities, all of which are franchised public utilities or are owned by government entities."); Brief of Amicus Curiae City of Springfield, Missouri in Support of Respondent at 2 (city enacted flow control in order to fund construction of a materials recovery and composting facility); Brief of Amici Curiae Town of Smithtown et al. in Support of Respondent at 1-2 (statement by a New York town, a New York county, and two New Jersey counties that, although they "have fulfilled their [waste management] responsibilities through different disposal means, * * * flow control mechanisms are fundamental to each *amici*'s [sic] success"); Brief *Amicus Curiae* of the Solid Waste Disposal Authority of the City of Huntsville, Alabama in Support of Respondent at 1-4 (describing city's flow control ordinance and asserting that "[t]he availability of funds for the payment of [the waste authority's] outstanding bonds depends upon its receipt * * * of *all* tipping fees with respect to the operation by the City of its Waste Collection and Disposal System") (emphasis in original); Brief Amici Curiae of City of Indianapolis et al. in Support of Respondent at 6 (amicus brief on behalf of ten cities, counties, and waste authorities in nine states, plus several associations, asserting that "[t]he present *amici* (or the communities that the organizational *amici* represent) * * * relied on waste management facility designation—flow control—ordinances as a key component of

[their] waste management decisions"); Brief of County of Rockland as *Amicus Curiae* in Support of Respondent at 4-9 (asserting that county must have the ability to impose flow control in order to pay for its planned recycling facility); Brief for the State of New York et al. as *Amici Curiae* in Support of Respondent at 1 ("New York State has authorized 38 localities and solid waste management units to enact flow control laws so that they can fulfill their responsibility for safe, environmentally-sound management of solid waste.").

As the amicus briefs further reflect, many of the affected counties and towns own the facilities that were the beneficiaries of their flow control ordinances. In the wake of the Second Circuit's decision, those counties and towns can be expected to reinstate their flow control ordinances. Moreover, it would be a simple matter for those towns and counties that do not currently own their preferred facilities to acquire them for $1 along with the promise of increased tipping fees that would be the inevitable result of the reinstitution of mandatory flow control.

In short, the decision below threatens to create a sea change. It is imperative that this Court review and reverse that decision now before the balkanization forecast by Justice O'Connor begins in earnest.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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